

STATE OF MICHIGAN
COURT OF APPEALS

BASHAR ENTERPRISES, INC.,

Plaintiff/Counter-Defendant-
Appellee,

v

GAGGO INVESTMENTS, INC., NOURY
GAGGO and MIKE GAGGO,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED

August 10, 2010

No. 291477

Wayne Circuit Court

LC No. 08-112327-CH

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendants appeal as of right from a circuit court order denying their motion for summary disposition pursuant to MCR 2.116(C)(7) (claim barred by statute of limitations) and ordering the parties to submit their claims and counterclaim to arbitration. We affirm insofar as the claims concerning defendants Gaggo Investments and Noury Gaggo were ordered to arbitration, but reverse insofar as the claims concerning defendant Mike Gaggo were ordered to arbitration and remand for consideration of the motion for summary disposition as set forth in this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Initially, we address defendants' claims that the trial court erred in referring the case to arbitration. Defendants note that the previous arbitration proceedings were dismissed because statutory arbitration of "title claims" is prohibited by MCL 600.5005, which states:

A submission to arbitration shall not be made respecting the claim of any person to any estate, in fee, or for life, in real estate, except as provided in Act No. 59 of the Public Acts of 1978, as amended, being sections 559.101 to 559.272 of the Michigan Compiled Laws. However, a claim to an interest for a term of years, or for 1 year or less, in real estate, and controversies respecting the partition of lands between joint tenants or tenants in common, concerning the boundaries

of lands, or concerning the admeasurement of dower, may be submitted to arbitration.¹

The prohibition applies where there is a disputed claim between the parties as to the title in fee of the property. *In re Dissolution of Toynton-Brown Co*, 308 Mich 727, 734-736; 14 NW2d 550 (1944). In this case, the parties do not dispute the title in fee of the property. Plaintiff's complaint acknowledges that defendants obtained title to the property, but asserts that they did so as part of a scheme to divest plaintiff of its interest in acquiring the property. Although plaintiff's count II is styled as an action to quiet title, as defendants represented to the trial court, that claim is substantively

a claim for fraud and/or breach of contract. It never makes a claim that title is in Bashar at this time, it only claims that it should receive title by reason of the actions or activities of the Defendants.

Defendants cannot now argue that plaintiff's action actually did involve a claim that it had title, contrary to their position below. See *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991) ("[e]rror requiring reversal must be that of the trial court, and not error to which the appellant contributed by plan or negligence"). Furthermore, an attempt by plaintiff to assert "a claim . . . in fee . . ." based on the transactions set forth in the complaint would amount to a collateral attack on the circuit court's 1994 judgment that title and possession reverted to defendants' predecessor, Varoujan Basmajian.

Defendants also contend that the only arbitration agreement is from August 1999 and it is no longer enforceable because the statute of limitations has expired. However, the August 1999 document is not merely the parties' agreement to arbitrate their dispute; it is a written court order, which is not governed by the limitations period for contract actions. And, in any event, the timeliness of a plaintiff's claims is a question to be decided by the arbitrator rather than the trial court. *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 229, 232-233; 590 NW2d 580 (1998).

Notwithstanding, nowhere in this stipulated order does defendant Mike Gaggo's name or signature appear.² Instead, the caption lists defendants Noury Gaggo and Gaggo Investments, jointly and severally. Moreover, the only named defendant in this case to sign that order was Noury Gaggo, whose signature appears on the order twice—once as president of Gaggo Investments and once individually, and plaintiff can cite no other arbitration agreement involving Mike Gaggo. "[A] party cannot be required to arbitrate when it is not legally or factually a party to the agreement." *Hetrick v David A Friedman, DPM, PC*, 237 Mich App 264, 267; 602 NW2d 603 (1999) (citation omitted). See also *Lexus Financial Services, Inc v Trombly Tindall, PC*, 261 Mich App 417, 419; 683 NW2d 185 (2004) ("[a] court may only compel arbitration, however, when the parties have expressly agreed to arbitrate their dispute"). Thus, where Mike

¹ The parties do not contend that the exceptions to the general rule apply in this case.

² Mike Gaggo is the treasurer of Gaggo Investments.

Gaggo was not individually part of the arbitration agreement and order, we conclude the circuit court erred in ordering the claims against Mike Gaggo to arbitration.³

Consequently, we reverse the court's ordering of the claims concerning Mike Gaggo to arbitration. Additionally, because the circuit court ordered arbitration without ruling on the merits of defendants' motion for summary disposition with respect to Mike Gaggo, we remand for consideration of that motion. The circuit court's order is affirmed with respect to the claims concerning Gaggo Investments and Noury Gaggo.

We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Elizabeth L. Gleicher

³ Relying on a number of cases in support of the proposition that courts should disregard corporate form to prevent fraud, illegality, or injustice when dealing with closely-held corporations, plaintiff urges that we affirm the circuit court's order since Mike Gaggo is a necessary party with a vested interest in the outcome of this action. See, e.g., *Paul v Univ Motor Sales Co*, 283 Mich 587; 278 NW 714 (1938), and *Williams v American Title Ins Co*, 83 Mich App 686; 269 NW2d 481 (1934). We find plaintiff's argument at this juncture ironic given that plaintiff made no issue of Mike Gaggo's individual involvement in arbitration in 1999. Indeed, had Mike Gaggo been a necessary party, plaintiff could have sought his individual involvement at that time just as it did Noury Gaggo (whose name along with Mike Gaggo was included in Gaggo Investment's Articles of Incorporation). In light of this, the potential fraud, illegality, or injustice of which plaintiff warns would only be that to which plaintiff contributed out of its own negligence and would be no basis for error. See *Bloemsma*, 190 Mich App at 691. In any event, under the circumstances of this case, our observance of corporate form is appropriate.